

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Telecommunications Carriers Eligible for	)	WC Docket No. 09-197
Universal Service Support	)	
	)	
Lifeline and Link Up Reform and	)	WC Docket No. 11-42
Modernization	)	
	)	
Q Link Wireless, Inc., et al.,	)	
	)	
Petitions for Designation as Lifeline	)	
Broadband Providers	)	

**COMMENTS OF  
THE NATIONAL TRIBAL TELECOMMUNICATIONS ASSOCIATION**

**I. INTRODUCTION AND SUMMARY**

The National Tribal Telecommunications Association (NTTA) provides these comments in response to several petitions for designation as Lifeline Broadband Providers (LBP).<sup>1</sup>

NTTA consists of Tribally-owned communications companies including Cheyenne River Sioux Telephone Authority, Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., Hopi Telecommunications, Inc., Mescalero Apache Telecom, Inc., Saddleback Communications, San Carlos Apache Telecommunications Utility, Inc., Tohono O'odham Utility Authority, and Warm Springs Telecom. NTTA's mission is to be the national advocate for telecommunications service on behalf of its member companies and to provide

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<sup>1</sup> *Petition for Designation as Lifeline Provider*, filed by Q Link Wireless and seven other carriers, filed between October 3 and October 27, 2016 (*LBP Petitions*). See Appendix A for a list of the LBP Petitions addressed by these comments

guidance and assistance to members who are working to provide modern telecommunications services to Tribal lands.

The *LBP Petitions* are submitted pursuant to decisions made in the Commission's *2016 Lifeline Reform Order*<sup>2</sup> and as codified in 47 CFR §54.202(d) – (e). LBPs are a new class of eligible telecommunications carrier (ETC) the Commission adopted in order to provide for a more "streamlined" eligibility process for those carriers wishing to provide broadband internet access services to Lifeline customers only and that do not request access to other high cost support programs under the jurisdiction of the FCC. Once the new rules became effective, the Wireline Competition Bureau received a number of LBP Petitions, some of which NTTA will address in these comments.

NTTA opposes the *LBP Petitions* that purport to effect service in Tribal areas on the grounds that (1) the treatment assumed in the Petitions is premature given pending court appeals, (2) the notice required to be provided to Tribal governments pursuant to 47 CFR §54.202(c) is inadequate absent some type of input process by the notified entities, and (3) absent meaningful input from the affected Tribal governments, the *LBP Petitions* cannot be concluded to be in the public interest. Finally, NTTA, on behalf of its member companies and the Tribal governments that own and operate these carriers, objects to the lack of formal public notice regarding the *LBP Petitions* and the resulting public comment period.

## **II. PENDING COURT APPEALS MAKE THE ASSUMED FEDERAL TREATMENT OF LBP PETITIONS PREMATURE**

In the *2016 Lifeline Reform Order*, the Commission preempted state commission (and presumably Tribal government) involvement in the designation of LBPs.<sup>3</sup> Not surprisingly, state commissions objected to this change in designation authority, which resulted in a petition for review filed by the National Association of Regulatory Utility Commissioners (NARUC) at the United States Court of Appeals for the District of Columbia Circuit.<sup>4</sup>

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<sup>2</sup> *In the Matter of Lifeline and Link Up Reform and Modernization*, et. al., WC Docket No. 11-42, Third Report and Order and Order on Reconsideration, FCC 16-38 (rel. April 27, 2016) (*2016 Lifeline Reform Order*)

<sup>3</sup> *Id.*, at 249-258

<sup>4</sup> *National Association of Regulatory Utility Commissioners v. Federal Communications Commission and the United States of America*, D.C. Circuit Court of Appeals, Case No. 16-1170 (*NARUC Petition*)

Previously, state commissions had sole ETC designation authority where a specific commission exerted jurisdiction over the requesting carrier. This policy was adopted by Congress<sup>5</sup>, and served to provide for a front-line review of carriers purporting to offer critical services and receive finite resources in the form of federal universal service support in return. Congress recognized that state commissions were in much better position to evaluate ETC applications and to ensure that the public interest was being met in approving or denying such applications. With the adoption of the LBP process, the Commission turned this logic on its head and determined that it, via the Wireline Competition Bureau, alone is best suited to examine and rule upon LBP applications, some of which could affect millions of customers across the country – including those residing in sovereign Tribal lands.

In the *NARUC Petition*, state commissions are demonstrated to be the “beat cops” in regards to protecting the public interest surrounding ETC designations.<sup>6</sup> NARUC makes a convincing argument that, absent these beat cops, this will result in additional fraud and abuse<sup>7</sup>, and the provision of substandard services to Lifeline consumers by certain subsidized providers.<sup>8</sup> Nowhere is this enforcement more important than in Tribal areas, a fact that the Commission implicitly recognized when it adopted the Tribal Engagement rules in 2011.<sup>9</sup>

The LBP designation process adopted in the *2016 Lifeline Reform Order* and as discussed by the Wireline Competition Bureau<sup>10</sup>, wherein the Commission asserts sole jurisdiction, is currently under court review; therefore, any LBP designations considered prior to the court’s ruling are premature. To move forward without resolution by the court of the vital issues raised in the *NARUC Petition* would put millions of possible LBP customers in danger of receiving substandard service and is thus not in the public interest.

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<sup>5</sup> 47 USC §214(e)(6)

<sup>6</sup> *NARUC Petition* at 9

<sup>7</sup> See e.g., NARUC March 20, 2016 Ex Parte filing in WC Docket Nos. 11-42 and 09-197, at 2

<sup>8</sup> *Id.*, at 6

<sup>9</sup> See 47 CFR §54.313 (a)(9)

<sup>10</sup> See *Wireline Competition Bureau Provides Guidance Regarding Designation as a Lifeline Broadband Provider and Lifeline Broadband Minimum Service Standards*, Public Notice (DA 16-1118) rel. September 30, 2016

### III. TRIBAL ENGAGEMENT IS REQUIRED PRIOR TO APPROVING LBP PETITIONS

#### A. Tribal Engagement Rules Provide a Basis for Tribal Government Involvement

The Commission previously adopted a rule that addresses, in part, NTTA's major concern with the new LBP process; namely, that Tribal governments have no formal or explicit say in which carriers provide subsidized service on Tribal lands. The rule states:

A common carrier seeking designation as an eligible telecommunications carrier under section 214(e)(6) for any part of Tribal lands shall provide a copy of its petition to the affected Tribal government and Tribal regulatory authority, as applicable, at the time it files its petition with the Federal Communications Commission. In addition, the Commission shall send any public notice seeking comment on any petition for designation as an eligible telecommunications carrier on Tribal lands, at the time it is released, to the affected Tribal government and Tribal regulatory authority, as applicable, by the most expeditious means available.<sup>11</sup>

While this rule preexisted the LBP rules adopted as a result of the *2016 Lifeline Reform Order*, the requirements appear to be relevant to LBP petitions. What is unknown is the purpose of these notices, whether they have been properly made, and how to proceed in light of the existence of the *LBP Petitions*.<sup>12</sup> It is NTTA's contention that the public interest test required by 214(e)(6) of the Telecommunications Act, and by section 54.202(b) of the Commission's rules, can only be met in the case of LBP requests that cover Tribal lands with the involvement and consent of Tribal governments. Any other interpretation of 54.202(c) would render it meaningless, and would risk violation of Tribal sovereignty. NTTA further believes that the Commission's own Tribal Engagement rules provide a basis for this involvement.

The Commission's Tribal Engagement rules, adopted with the *2011 USF Transformation Order*<sup>13</sup>, provide a compelling basis for which to require Tribal government involvement in the

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<sup>11</sup> 47 CFR §54.202(c)

<sup>12</sup> NTTA is anecdotally aware of one notice provided by a LBP petitioner, but is not aware of any further notices, nor of any Public Notice issued by the Commission alerting interested parties of the comment deadlines.

<sup>13</sup> *In the Matter of Connect America Fund*, et. al., WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking (FCC 11-161), released November 18, 2011 (*USF Transformation Order*) at 636; *See also*, *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Order*, Public Notice, WC Docket No. 10-90, et. al., released July 19, 2012 (DA 12-1165) (*ONAP Further Guidance*)

LBP designation process. The Commission agreed, in the *USF Transformation Order*, “that engagement between Tribal governments and communications providers either currently providing service or contemplating the provision of service on Tribal lands is vitally important to the successful deployment and provision of service.”<sup>14</sup> As a reminder, the Tribal Engagement Rules require recipients of high cost support to conduct discussions with Tribal governments that, at a minimum include:

- (1) A needs assessment and deployment planning with a focus on Tribal community anchor institutions;
- (2) Feasibility and sustainability planning;
- (3) Marketing services in a culturally sensitive manner;
- (4) Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and
- (5) Compliance with Tribal business and licensing requirements. Tribal business and licensing requirements include business practice licenses that Tribal and non-Tribal business entities, whether located on or off Tribal lands, must obtain upon application to the relevant Tribal government office or division to conduct any business or trade, or deliver any goods or services to the Tribes, Tribal members, or Tribal lands. These include certificates of public convenience and necessity, Tribal business licenses, master licenses, and other related forms of Tribal government licensure.

All of the above requirements contribute to services that meet the needs of residents of Tribal lands, ensure all relevant regulations are met, and ensure that all parties involved understand the unique circumstances involved in serving these areas. NTTA argues that the rules provide for a solid basis for Tribal government involvement in the LBP designation process.

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<sup>14</sup> *USF Transformation Order* at 637

## **B. The Commission's Tribal Policy Statement Demands Tribal Government Participation**

On June 23, 2000, the Commission adopted the *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*<sup>15</sup> that essentially established the parameters under which the Commission interacts with Tribal governments in matters of communications policy. This Policy Statement adopted several principles, with the most important to the issues being discussed in these comments being:

- (1) The Commission will endeavor to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services.<sup>16</sup>
- (2) The Commission, in accordance with the federal government's trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.<sup>17</sup>
- (3) The Commission will strive to develop working relationships with Tribal governments, and will endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands.<sup>18</sup>

These policies are clearly relevant in the context of the *LBP Petitions* as Tribal governments have an interest in ensuring their citizens have adequate access to communications services; the LBP Petitions, and the approval process adopted, consist of a regulatory action that will significantly affect Tribal governments; and the LBP approval process calls for Tribal consultation as the petitions create a regulatory process that affects telecommunications service-related issues on Tribal lands. In short, Tribal governments should have a significant role to play in allowing, or not allowing, carriers to provide vital broadband services in Tribal areas in competition for scarce federal Lifeline resources.

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<sup>15</sup> *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement rel. June 23, 2000 (FCC 00-207) (*Tribal Policy Statement*)

<sup>16</sup> *Id.*, at p. 4

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, p. 5

#### IV. LBP DESIGNATIONS DEMAND LOCAL OVERSIGHT AND CONTROL

The very nature of ETC and LBP designation – the authority provided companies to draw from various, and finite, federal, and sometimes state, universal service funds – begs for some measure of local control and review. Indeed, in his statement attached to the *2016 Lifeline Reform Order*, Commissioner Pai forcefully agrees:

“...the *Order* cuts state commissions out of the Lifeline designation process, crippling their ability to guard against waste, fraud, and abuse. That’s a disaster in the making. We need more cops on the beat, not fewer. And the state commissions thus far have the best track record.”<sup>19</sup>

In many instances, the Tribal governments act in a role similar to that of the state commission, and thus could provide as valuable a service as the state commissions noted in Commissioner Pai’s statement. Indeed, the Commission recognizes this fact by virtue of the adoption of Tribal Engagement rules. In addition, at least one state – Oregon – adopted ETC designation rules that explicitly require Tribal government participation and approval (or no objection)<sup>20</sup>:

11. Designation on Tribal Lands

Applicants requesting designation on Tribal Lands must notify and engage appropriate Tribal authorities in the proposed designated service area. Evidence of such notification and engagement must be provided in the application or in a supplemental filing, and include the information required in 11.1, 11.2 and 11.3 below.

- 11.1 Copy of notice to appropriate Tribal government or regulatory entity of filing of ETC application, and identification of specific method and date of delivery. This should include the name of person to whom notice was sent.
- 11.2 Summary of Tribal engagement efforts, e.g., dates and topics of meetings, participants, information shared, etc. and an explanation as to how the applicant addressed the following areas (as applicable):
  - 1. Needs assessment and deployment planning with a focus on Tribal community anchor institutions;
  - 2. Feasibility and sustainability planning;
  - 3. Marketing services in a culturally sensitive manner;

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<sup>19</sup> *2016 Lifeline Reform Order*, Dissenting Statement of Commissioner Ajit Pai, at p. 6

<sup>20</sup> *In the Matter of Staff Investigation into Eligible Communication Carriers’ Requirements*, Docket No. UM 1648, Order No. 15382 (entered Dec. 1, 2015) at Appendix A, p. 5

4. Rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and
  5. Compliance with Tribal business and licensing requirements. Tribal business and licensing requirements are as described in 47 CFR 54.313(a)(9)(v).
- 11.3 Results of Tribal engagement efforts with evidence that the appropriate Tribal government or regulatory entity either supports or does not oppose applicant's designation as an ETC on the relevant Tribal Lands.

The Public Utility Commission of Oregon made clear that the state's Tribal engagement rules apply to Lifeline-only as well as other ETCs:

"The new requirements parallel 47 CFR §§ 54.313(a)(9) and 54.1004(d). However, while the federal regulations appear to be primarily directed at ETCs receiving high-cost support, the stipulating parties agree that the same general approach is valid for Lifeline-only providers as well. This requirement acknowledges and respects the status of the nine federally recognized tribes in Oregon as sovereign nations, and promotes consultation on matters directly affecting their communities, by requiring initial engagement and evidence that the appropriate Tribal government or regulatory entity supports, or does not oppose, the application."<sup>21</sup>

Given the history of ETC designations and the fact that Congress, via Section 214(e)(6) gave the Commission authority to designate ETCs only in situations where the state commission did not exert jurisdiction over a particular prospective ETC, the statement by Commissioner Pai, and the actions of the PUC of Oregon, it is clear that the more localized the control over and review of ETC applications, the better. As a result, NTTA strongly recommends the Commission, in cases where a LBP petition purports to cover Tribal areas, while the *NARUC Petition* is pending, to delay a finding that such an LBP petition is in the public interest unless and until the affected Tribal government has provided its approval or has noted it has no objection. This can only happen if the affected Tribal governments are provided a reasonable chance to review the petitions and are afforded a reasonable amount of time to do so.

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<sup>21</sup> *Id.*, at p. 6



## **V. CONCLUSION**

NTTA requests the Commission find that the *LBP Petitions*, as filed and as considered through the current LBP designation process, to be found not in the public interest to the extent they cover any Tribal lands, until such time as the affected Tribal governments have been given a reasonable opportunity to review such applications. Furthermore, Tribal governments should be provided the authority to approve or deny LBP applications, if the affected authorities so choose and only after adequate notice and explanation of the LBP applications are provided. Thus far, NTTA has seen little to no evidence that affected Tribal governments have been adequately notified of the LBP petitions, therefore depriving the Tribes of any input whatsoever over the authority of LBPs to operate on Tribal lands.

Respectfully Submitted,

Godfrey Enjady  
*President*  
**National Tribal Telecommunications Association**

November 17, 2016

**Appendix A**

National Tribal Telecommunications Association  
Lifeline Broadband Provider Petition Comments  
List of LBP Petitions

<u>Petitioner</u>	<u>NTTA Member States Covered</u>
Q Link	Nationwide – AZ, NM, OR, SD
Assist Wireless	AZ, NM, OR
Blue Jay Wireless	AZ, NM, OR
i-Wireless, LLC	AZ, NM, OR
Karma Mobility	AZ, NM, OR
Telrite	Nationwide – AZ, NM, OR, SD
TruConnect Communications	AZ, NM, OR, SD
Boomerang	AZ, NM, OR, SD